Supreme Court, U.S.
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In the

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-151

HARRY K. WASOFF,

*Appellant,*

*v.*

AMERICAN AUTOMOBILE INSURANCE COMPANY,

*Appellee.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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*To the Honorable Supreme Court of the United States:*

The petitioner, Harry K. Wasoff, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on May 4, 1971.

## OPINIONS BELOW

There was no formal opinion of the United States District Court for the Northern District of Texas. An excerpt

from the record of that Court is reproduced in Appendix A to this Petition and indicates that Court's dismissal of this cause.

The Per Curiam opinion of the Court of Appeals affirming the District Court is attached as Appendix B and is reported at 441 F. 2d 268.

## JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The order of the Court of Appeals, affirming the District Court, was entered on May 4, 1971.

## QUESTIONS PRESENTED BY THIS WRIT

The petition was dismissed involuntarily in the District Court for failure to prosecute this action after a delay of less than one week. Efforts to reinstate the action were dismissed or denied by the District Court 352 days after the filing of the motion for reinstatement without notice or hearing. This procedure was reviewed and affirmed by the Court of Appeals in an action brought by the petitioner immediately after the denial of reinstatement in the District Court. The questions presented are:

1. Whether Rule 60(b) of the Federal Rules of Civil Procedure contemplates notice and hearing before denying the relief accorded a movant by the Rule.

2. Whether the absence of a hearing before denying relief accorded under Rule 60(b) of the Federal Rules of Civil Procedure is equivalent to a taking of property in violation

of the protection of the 5th Amendment to the Constitution of the United States.

3. Whether the federal interest in uniformity of relief in each District Court is applicable to Rule 60(b) of the Federal Rules of Civil Procedure.

4. Whether the relief available under Rule 60(b) of the Federal Rules of Civil Procedure is to be administered in a uniform manner through guidelines which effectively establish the limits of the judiciary's discretionary standard.

## CONSTITUTIONAL AND RULES PROVISIONS

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "* * * nor be deprived of life, liberty, or property, without due process of law; * * *"

Rule 60(b) of the Federal Rules of Civil Procedure, dealing with reinstatement after dismissal, provides as follows:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding * * *."

## STATEMENT OF THE CASE

This cause was originated in the Texas state court by the petitioner and was subsequently removed by the defendant to the United States District Court due to diversity of citizenship. The action was primarily concerned with benefits due the petitioner for losses underwritten by a homeowners policy of insurance; however, the merits of that claim

were never reached as the action was dismissed under Rule 41(b) of the Federal Rules of Civil Procedure by the District Court.

The basis for this dismissal was that the newly-acquired counsel miscalculated the time for appearance; as a result of this error, the District Court, within two days after appearance was to have been properly made, dismissed for want of prosecution. Immediately following the dismissal, the petitioner moved for reinstatement, which, after a 352-day delay by the District Court was denied without opinion, notice to the petitioner, or hearing on the motion which had also been accompanied and supported by a memorandum brief.

Appeal to the Court of Appeals for the Fifth Circuit was immediately taken. The petitoner was given oral argument by the Court of Appeals; however, that Court affirmed the District Court without opinion.

It appears from contrasting this action with many other cases which invoke the relief provided by Rule 60(b) of the Federal Rules of Civil Procedure that no uniform policy is established within the judiciary for application of this Rule. Therefore, Certiorari is sought to review the application and administration of Rule 60(b) and to resolve this problem of an unpredictable application of this Rule as evidenced by the vascillating decisions of the lower Courts when utilizing Rule 60(b) in cases containing similar facts. This practice renders precedent useless and inserts a disordered practice into a system where uniformity is the established guideline.

## REASONS FOR GRANTING THE WRIT

Without question, Rule 60(b) is considered one which demands a liberal construction and therefore utilization in cases where the facts indicate a necessity for vacating prior judgments. However, the espoused purpose of the Rule has been defeated by the reluctance of courts to reconsider judgments, since crowded dockets and the need for expeditious justice have usurped the time necessary to consider these motions. The effect of this lack of usage of Rule 60(b) has been to increase appellate docket caseload and ultimately to deny justice toward those litigants who should have been given added time in the trial court.

### (i) Considerations which should be utilized by the Trial Courts in applying Rule 60(b) are largely ignored

By the terms of the Rule itself, relief under Rule 60(b) is addressed to the sound discretion of the trial court. However, it is also to be noted that the discretion of the courts in applying the Rule has sought to be guided by the application of "sound legal principles." This restraint was noted in *De Meulenaere v. Rockwell Mfg.*, 31 F.R.D. 575; aff'd 312 F. 2d 209; cert. den. 374 U.S. 813, wherein the courts agreed that they were

> "* * * fully aware of the seriousness of dismissing [an] action with prejudice for lack of prosecution. It would deny the plaintiffs their day in court and this is not desirable. As Chief Judge Clark stated in *Gill v. Stolow*, 240 F. 2d 669, 670 (2nd Cir. 1957) * * *. 'In final analysis, a court has the responsibility to do justice between man and man; and general principles cannot justify denial of a party's fair day in court

> except upon a serious showing of wilful default' * * *. Chief Judge Clark's warning that a court should not dismiss an action with prejudice except on *very substantial evidence*, should not be taken lightly." (emphasis added)

The same principle, coupled with the theory of liberal construction of the Rule, was noted in *Serio v. Badger Mutual Ins. Co.*, 266 F. 2d 418 (5th Cir., 1954), cert. den. 361 U.S. 832; *Laguna Royalty Co. v. Marsh*, 350 F. 2d 817 (5th Cir., 1965), and *Michigan Surety Co. v. Service Machinery*, 277 F. 2d 531 (5th Cir., 1960). However, at the same time, courts in *Hoffman v. Celebrezzi*, 405 F. 2d 833 (8th Cir., 1969) and *Di Vito v. Fidelity & Deposit Co. of Md.*, 361 F. 2d 936 (7th Cir., 1966), indicated that "very exceptional circumstances" were a necessary prerequisite to Rule 60(b) relief, while other courts in *Brown v. Pennsylvania R. Co.*, 282 F. 2d 522, (2nd Cir. 1960), cert. den. 365 U.S. 818 and *Kender v. General Expressways, Limited*, 34 F.R.D. 237 (1963) required clear and convincing evidence to allow relief from judgment.

In addition to the prevailing conflict as to what standard is currently incumbent upon the movant in order to invoke Rule 60(b) relief, other courts have utilized such tests as

(1) realization of the harsh result achieved,

(2) lack of dilatory conduct attributable to the movant,

(3) examination of the procedural history of the case and no finding of substantial delay,

(4) the weighing of the delay caused by the movant against the federal policy favoring litigation on the merits, and

(5) establishment of a need for substantial evidence indicating an excessive delay before dismissal is justified.

Each of these tests may be found in *Delta Theatres, Inc. v. Paramount Pictures, Inc.*, 398 F. 2d 323 (5th Cir., 1968), cert. den. 393 U.S. 1050; *Castlegate, Inc. v. National Tea Co.*, 34 F.R.D. 221 (1963), *Sandee Mfg. Co. v. Rohm and Haas Co.*, 298 F. 2d 41 (7th Cir., 1962), *Dyotherm Corp. v. Turbo Machinery Co.*, 392 F. 2d 146 (3rd Cir., 1968), as well as the Second Circuit opinion in *De Meulenaere v. Rockwell* noted above. However, at no time has it been affirmatively decided which test, tests, or combination thereof the movant must meet to qualify for relief under Rule 60(b).

The Rule evolved from a California rule of procedure. Utilizing that background, an early California federal court, in *Petition of Pui Lan Yu*, 20 F.R.D. 399 (1957), in interpreting the federal rule, noted that the burden is on the movant to show justification for Rule 60(b) relief; consequently, it would appear that a uniform interpretation of that burden is necessary. As no established guideline for the application of Rule 60(b) has been positively established, the procedure which invokes the Rule has been subordinated to a summary and arbitrary process. This process varies from court to court and circuit to circuit and depends to a great degree upon the attitude of the individual courts toward reinstatement. In this manner, the movant is forced to design his motion toward favoring the policy of the individual

court rather than utilizing federal guidelines to the utmost degree. In light of this practice, it is appropriate that this Court acting in its administrative capacity review the procedure and test to be applied in granting or denying reinstatement.

**(ii) Decisions of Trial Courts which are based on varying considerations without the benefit of hearing violate due process**

In *Woodham v. American Cystascope*, 335 F. 2d 551 (5th Cir., 1964), it was held that

> "Rule 1 of the Federal Rules of Civil Procedure (was) designed to temper the discretionary power of the District Court: the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action. The force of this first and greatest of the Rules should not be blunted by district court's exaggerating the importance of local rules and enforcing such rules through inappropriate, over-rigorous sanctions."

In most cases, local rules or procedures which are intended to complement the federal rules are mere rote housekeeping measures. However, local practice which deprives opportunity of hearing and notice to a movant invoking Rule 60(b) is a violation of the established right of a party to show cause for reinstatement. As it has been previously indicated, the burden is on the movant to show why he should be granted relief under the Rule; however, no procedure is outlined by the Rule through which he can fulfill this requirement. The petitioner therefore submits that this Court should now determine the procedural rights accorded by due process after a judgment has been rendered and should formulate a notice and hearing requirement before denial of reinstatement.

This Court, in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), stated that

> "An elementary and fundamental requirement of due process *in any proceeding which is to be accorded finality* is notice reasonably calculated, under all circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections." (emphasis added)

There can be no question that denial of relief under Rule 60(b) constitutes a final judgment. See *In the Matter of Marachowsky Stores Co.*, 188 F. 2d 686 (7th Cir., 1951), cert. den. 342 U.S. 822; *Greenspahn v. Joseph E. Seagram & Sons*, 186 F. 2d 616 (2nd Cir., 1951). It must therefore be assumed that this Court meant for this rule to be applied in the Rule 60(b) situation. Failure to provide the notice and opportunity of hearing made available through due process would appear to invalidate the resulting decree as a judicial determination entitled to respect in any tribunal. *Bass v. Hoagland*, 172 F. 2d 205 (5th Cir., 1949) and *Savoretti v. Rodriquez-Jiminez*, 252 F. 2d 290 (5th Cir., 1958). This proposition was also announced in *Hovey v. Elliott*, 167 U.S. 409 (1897).

Denial of reinstatement effectively deprives the litigant of his cause of action. As there seems to be little question that a cause of action is a property right, this type of deprivation is subject to the normal requirements of due process. Although one District in *U. S. Fidelity & Guaranty Co. v. Lawrenson*, 34 F.R.D. 121 (1964), held that motions

clearly without substance were not entitled to a hearing, this Court has not addressed the problem specifically. Frivolity may indeed be good cause for denying due process; however, levity is neither a part of the petitioner's motion, nor is it a traditional reason for denying a constitutional guarantee to a litigant.

The denial of hearing and notice is the practice rather than the exception. No justification for this procedure is noted in Rule 60(b) and the practice is one of convenience rather than law. To the contrary, due process would appear to require more stringent protection of the movant's rights under Rule 60(b) rather than demeaning the effect of the rule to its present position of a mere troublesome post-trial motion which further crowds the trial docket. Certiorari should be granted to re-establish a uniformity of procedure for reinstating causes in accordance with the requirements of due process and the clear intent of *Mullane*.

## CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted. The questions raised are of general and recurring importance to the administrative processes within the federal judiciary. A review by this Court of the conflicting application of the relief afforded by Rule 60(b) throughout the circuits and determination of the test

to be utilized before relief may be granted is necessary to insure that the federal interest in uniformity is maintained.

Respectfully submitted,

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By _____

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A copy of this Petition for Writ of Certiorari is being mailed to Mr. Franklin Perry, of Thompson, Coe, Cousins, Irons and Porter, 920 Hartford Building, Dallas, Texas 75201, attorney for appellee, on the day of , 1971.

_____
Robert A. Fanning
Harlan Harper, Jr.

## APPENDIX A

## IN THE UNITED STATES DISTRICT COURT
## NORTHERN DISTRICT OF TEXAS
## DALLAS DIVISION

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**Civil Action No. 3-3882-A**

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HARRY K. WASOFF,

*Plaintiff,*

*v.*

AMERICAN AUTOMOBILE INSURANCE COMPANY,

*Defendant.*

### JUDGMENT

It appearing that no counsel for Plaintiff has appeared herein as required by order of this Court dated the 28th day of August 1969,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this cause be and it is hereby DISMISSED for want of prosecution.

Costs are taxed against the Plaintiff.
Dated this 1st day of October, 1969.

/s/ JOE E. ESTES

United States District Judge

APPDENIX B

IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

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No. 30923

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HARRY K. WASOFF,

*Plaintiff-Appellant,*

*v.*

AMERICAN AUTOMOBILE INSURANCE COMPANY,

*Defendant-Appellee.*

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*Appeal from the United States District Court for the Northern District of Texas*

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(May 4, 1971)

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Before O'SULLIVAN*, THORNBERRY and DYER, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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* Senior Circuit Judge, 6th Circuit, sitting by designation.

[1] See *NLRB v. Amalgamated Clothing Workers of America*, 5th Cir. 1970, 430 F. 2d 966.

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AMERICAN AUTOMOBILE INSURANCE COMPANY,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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---

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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*To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:*

The respondent, American Automobile Insurance Company, herewith files the following Brief in Opposition to the Petition for Writ of Certiorari in the above-entitled case:

We submit to this Court that the uncontroverted facts in the case at bar demonstrate conclusively that the questions presented for review by petitioner are either not raised by the record or are wholly without merit, that the decision

below turns upon its own facts and will affect few if anyone besides the parties hereto, and that there are thus no special and important reasons for review by this Court within the meaning of Rule 19, Revised Rules of the Supreme Court of the United States.

## OPINION BELOW

The opinion of the trial court involved herein is not that appended to the petition for certiorari as Appendix A, but was an Order Denying Plaintiff's Motion for Reinstatement and in the Alternative Motion for Relief From Judgment or Order. This order denying relief under Rule 60(b), Federal Rules of Civil Procedure, is reproduced in Appendix A to this brief.

It was that order denying Rule 60(b) relief that was affirmed per curiam by the court of appeals (Appendix B of Petition).

## STATEMENT OF THE CASE

This action was brought by petitioner upon a homeowner's insurance policy for alleged hail damage to his dwelling in Dallas, Texas. Jurisdiction of the United States District Court was based upon diversity of citizenship and thus Texas substantive law controls. The amount in controversy is $10,714.42. The Texas insurance contract contained a provision that if the parties failed to agree on the amount of loss, each party was to appoint an appraiser and the appraisers were to select an umpire, and the two appraisers

and the umpire were then to determine the amount of loss. This is a valid and enforceable provision in Texas. *Glens Falls Insurance Co. v. Peters*, 386 S.W. 2d 529 (Tex. Sup. Ct. 1965). One of respondent's defenses to the action was that it had timely demanded such an appraisal prior to suit, but that no such appraisal had been conducted.

A formal pre-trial conference was held by the trial court with the petitioner's first counsel attending. A lengthy pre-trial order was entered on June 5, 1969, which stated that there was an issue of fact between the parties as to whether petitioner complied with respondent's request for appraisal. However, after the pre-trial, the parties agreed to appraise the loss pursuant to the provisions of the insurance policy.

The events which then followed are recited in petitioner's brief in chief in the court of appeals as follows:

> "In compliance with the [respondent's] requests during the pre-trial conference to arbitrate [sic], the [petitioner], in order to aid in the disposition of this action, agreed to begin arbitration [sic] rather than have an immediate hearing. On June 23, 1969, the [petitioner] notified the [respondent] that in line with this agreement he had appointed an appraiser to represent his cause. The [respondent] made a similar selection on June 26, 1969. An umpire was selected and the damage appraised by these parties on July 23, 1969. The resulting award failed to satisfy 10% of the actual replacement cost incurred by the [petitioner]. Due to the extreme difference between the amount awarded by these appraisers and the cost already incurred by the [petitioner] plus estimates of future costs by the independent appraisers, the [petitioner] sought to have the claim reevaluated by the Court. Although arbitration [sic] awards are not as a general rule reviewable, evi-